SUPREME COURT, U. S.

NOV 20 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE AND JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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Opinion Below

The Opinion of the United States District Court for the Southern District of Iowa, as originally filed, appears at page 18, Single Appendix, filed herein. That order, as later corrected, is reported at 362 F.Supp. 180 (S.D. Iowa 1973). The Opinion of the United States Court of Appeals for the Eighth Circuit was printed as Appendix A, page 1a, Petition For Writ of Certiorari, and has since been reported in 494 F.2d 743.

Jurisdiction

On the 29th day of March, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion [Appendix A, p. 1a, Petition For Writ] and Judgment [Single Appendix, p. 31, filed herein]. No Petition for Rehearing was filed but upon a Motion filed by Petitioners, a Stay of issuance of the mandate was granted on April 15, 1974, provided that

within thirty (30) days there was filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a Petition for Writ of Certiorari and record had been filed [Appendix B, p. 8a, Petition For Writ]. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented

1. Does the policy of the State of Iowa, Department of Social Services, which denies Aid to Dependent Children Grants to an unborn child, conflict with the Social Security Act, thus contravening the Supremacy Clause of the United States Constitution?

2. Since the statutory language of Title 42 U.S.C. §606(a), which defines "dependent child", does not expressly provide that unborn children are included and the legislative history indicates that they are not included, can the Department of Health, Education and Welfare (HEW) or the judiciary mandate the states to include them?

Constitutional Provisions, Statutes and Regulations

The Supremacy Clause [Article VI, second paragraph]; 42 U.S.C. §606(a) of the Social Security Act; 42 U.S.C. §602(b) [but now obsoleted]; and 42 U.S.C. §603(d) [in P.L. 90-248, §208(b)] [since repealed]; and Federal Regulations 45 C.F.R. §233.90(a); §233.90(c) (1) and §233.90(c) (2) (ii) are set forth in Addendum B hereof.

Other pertinent portions of the Social Security Act: [42 U.S.C. §601; §602(a), (7), (8), (16) and (17); §604(b); §605 and §606(c)], appear in the brief proper at pp. 4, 6 & 7, and pertinent portions of other Federal Regulations [45 C.F.R. §233.10 (a) (1) (i) and §30(2)] appear in the brief proper at pp. 10 & 11.

Statement of the Case

The Respondents, Plaintiffs below, representing themselves and other pregnant women who are denied AFDC payments by reason of the interpretation by Petitioners, State of Iowa, of Title 42 U.S.C. §606(a) so as to not include an unborn child within the term "dependent child", sought a declaratory judgment that Petitioners' actions by reason of said interpretation were invalid as conflicting with the federal statute; Respondents further sought to enjoin the denial of AFDC payments on the basis above stated and sought retroactive monetary damages for assistance withheld.

Respondents also alleged violations of their due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and jurisdiction of the District Court was invoked pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §2201, and Title 28 U.S.C. §1343. The District and Circuit Courts found it unnecessary to reach the due process and equal protection issues.

None of the named Respondents had living children but all three

were pregnant. All three applied for AFDC to the County Director of Social Services of Scott County, Iowa, as residents of that county and were rejected. Their financial circumstances were such that had their child or children been born, a grant under Iowa's Aid to Dependent Children statute would have been approved. (Stipulated evidence)

The Circuit Court affirmed the decision of the United States District Court for the Southern District of Iowa, that unborn children were eligible under the Social Security Act to receive AFDC grants and that Iowa's exclusion violated the Supremacy Clause. (The judgment of the District Court had been stayed by the United States Supreme Court pending hearing by the Circuit Court by Stay Order, dated October 9, 1973, indexed in Application A-288.)

Summary of Argument

Petitioners review Title IV of the Social Security Act which prescribes the eligibility factors for "dependent children" entitled to receive a grant in the Aid to Families With Dependent Children Program. They also refer to and quote from pertinent portions of the available legislative history of the Act. They comment upon the HEW administrative interpretation that a grant to an unborn child is an optional provision which the States may adopt or reject but if adopted, federal financial participation would be "available". Additionally, pertinent judicial decisions are referred to and discussed.

From the above, Petitioners respectfully suggest that only one conclusion can be drawn, namely, that Congress intended a child to be born before it may be eligible for an AFDC grant, and that the Circuit Court erred in judicially mandating Iowa to include unborn children within its classification of eligible individuals.

Petitioners also draw attention to alternative forms of relief for the prospective mother, and in passing, suggest that the other constitutional questions, which the Court properly did not reach, can withstand the constitutional challenge.

Argument

DIVISION I
DISCUSSION OF OPINIONS BELOW

One can more easily ascertain how error crept into the Decision and Opinion when one analyzes the underlying thinking of the District Court as disclosed in its Memorandum Opinion.[1]

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[1] The District Court Opinion and Judgment was reported in 362 F.Supp. 180 after the Court in its Order of August 24, 1973, had corrected the word "prenatal" to parental".

First, the District Court misquoted Title 42 U.S.C. §601 by inserting the word "prenatal" for the correct and crucial word "parental", and underscored the word "prenatal" for emphasis. This set the whole tone of the Opinion.[2]

Section 601 reads:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum sulf-support and personal independence consistent with the maintenance of continuing parental [misquoted as prenatal] care and protection, . . .

Second, the District Court in referring to the statutory definition of "dependent child" to determine what was and what was not said, indicated that it was looking for words *expressly excluding* the unborn.[3] It should have been looking for express words of *inclusion*. Adopting this wrong premise as the starting point would naturally bring a wrong result. The inquiry should have been "who were expressly included". *Townsend v. Swank*, 404 U.S. 282 (1971) and *New York Department of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed. 2d 688 (1973).

The Court of Appeals not only failed to reverse the starting point of the District Court and correctly make inquiry as to whom is *expressly included* (not expressly excluded) within the term "dependent child" [42 U.S.C. §606(a)], but compounded the error in holding that the HEW regulation [45 C.F.R. §233.90(c) (2)(ii)] (viewed by HEW as merely optional), is mandatory and Iowa must therefore extend its Aid to Dependent Children program to include the unborn.

The Court of Appeals, after stating: "A triad of Supreme Court cases 'establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause' *Townsend v. Swank*, 404 U.S. 282, 286 (1971). See *King v. Smith*, 392 U.S.

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[2]Attorneys for Plaintiffs in an "unborn child" case, U.S. District Court for the Southern District of Nebraska, *Linda Jones, et al. v. Laurence L. Graham*, Director of Public Welfare, Civil No. 73-L-235 [see Exhibit G (Affidavit of E. D. Warnsholz, Attorney General of Nebraska), Application for Stay of Judgment Pending Appeal, filed herein on 9/17/73], in briefs and oral agruments cited the Social Security Act as misquoted by the U.S. District Court of Iowa.

[3]The Court on page 185 in remarking that the results differ depending upon which approach is used specifically rejected that used by Judge Smith in *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973), saying Judge Smith was "looking for a very specific inclusion of 'unborn' which he did not find." (In *Parks*, the court held that unborn are not covered.)

309 (1968); *Carleson v. Remillard*, 406 U.S. 598 (1972)", concluded that "the *King, Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual denying benefits to unborn children and their mothers, violates the Supremacy Clause and is invalid."

Both courts below completely disregarded the clarification of "the triad" in *New York State Department of Social Services v. Dublino*, supra, wherein this Court states at 93 S.Ct. 2517:

> ". . . in those cases [King-Townsend-Remillard, supra] it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. . ." [Emphasis supplied.]

and in Footnote 29:

> ". . . and 'so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson* supra, at 541."

Perhaps this omission occurred under the misapprehension that Congress had *expressly* included the unborn since the Opinion, as originally filed, contained the misquoted word "prenatal" instead of "parental" as noted above. Instead of in some fashion dealing with *Dublino*, supra, the Court of Appeals in its conclusion said "We believe that the district court correctly concluded that the term 'dependent child' is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act."

Petitioners contend that this decision erodes, if not destroys, the cooperative federalism which this Court has repeatedly recognized as giving the States considerable latitude in allocating their AFDC resources. *King v. Smith*, supra, *Wyman v. James*, 400 U.S. 309 (1971), *Jefferson v. Hackney*, 406 U.S. 535 (1972).

DIVISION II

Congressional Intent

Petitioners sincerely believe that the language employed by Congress in setting forth the eligibility factors in Title IV, Aid to Families with Dependent Children [42 U.S.C. §606(a)] is clear and thus not susceptible of interpretation. *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). As therein stated, "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain. . . the sole function of the courts is to enforce it according to its terms".

The Respondents here, under the claim of ambiguity or doubtful meaning and guise of statutory construction actually are asking the judiciary to enlarge the scope of eligibility in the AFDC program. Petitioners, however, contend that a search for a different meaning of the term "dependent child" than set forth in the Act itself returns one to the same premise enunciated in *Caminetti*, supra, i.e., that Congress used

plain words in the Social Security Act which should be enforced in their ordinary meaning. In support of their contention, Petitioners respectfully refer this Court to pertinent language in the Act, its legislative history, administrative interpretations and judicial decisions.

a. Statutory Language

Congress in 42 U.S.C. §606(a) enumerates the combination of eligibility factors one must possess to receive AFDC. Under the maxim *expressio unius est exclusio alterius*, a fetus is excluded.

Chief Justice John Marshall in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174, 2 L.Ed. 60, 72, while in a different factual setting, expressed the doctrine thusly:

> "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no sense."

Looking at the Act itself, we find no specific provision therein which requires a State to give an AFDC grant for an unborn child. Indeed only the contrary can be concluded.

The term "dependent child" in Title IV of the Social Security Act is said to mean a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and *who is living with* his father, mother, grandfather, grandmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, *in a place of residence maintained by one or more of such relatives as his or their own home* and (2) is (A) under the age of eighteen or (B) under the age of twenty-one (if attending school). [Emphasis supplied.] [42 U.S.C. §606(a)]

No sensible construction of this language would include a fetus, and it is a well established principle of statutory interpretation that the law favors rational and sensible construction. 2A *Sutherland on Statutory Construction* §45.12, p. 37 (4th ed. C. Dallas Sands 1973).

In giving effect to the term "dependent child" in §42 U.S.C. §606(a), a Court " 'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' *United States v. Boisdore's Heirs*, 8 How. 113, 122." *NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957).* Moreover, the Court has cautioned against accepting a construction of particular terms that "would produce incongruous results." Id. quoting *Mastro v. NLRB*, 350 U.S. 270, 286 (1956).

Throughout the entire Act and Amendments thereto, it will be observed that Congress uses language which is inoperative were it to be applied to a child not yet born. In various places Congress has said:

(1) "care of dependent children in their *own homes* or in the homes of relatives" and "with whom they are *living*. . ." [Title 42 U.S.C. 601] [Emphasis supplied];

(2) "in determining need, take into consideration income and resources of any child. . ." [42 U.S.C. 602 (a) (7)];

(3) "earned income of a dependent child" [42 U.S.C. 602 (a) (8) (A) (ii)];

(4) if "the *home* in which a *relative and child* receiving aid *reside* is unsuitable for the child. . . ." [42 U.S.C. 602(a) (16)] [Emphasis supplied.];

(5) "in the case of a child *born* out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him. . . ." [42 U.S.C. 606(a) (17) (A) (i)] [Emphasis supplied];

(6) "in respect to a child . . . *who was born*" [Title 42 U.S.C. 602 (b) (2) - relating to residence - now obsolete under the doctrine of "right to travel"] [Emphasis supplied.];

(7) "average number of *dependent children under the age of* 18 . . . with respect to whom payments under this section . . . made to a State . . . shall not exceed the number which bears the same *ratio to the total population of such State under the age of 18* on the first day of the year . . ." [P.L. 90-248 sec. 208 (b) added this section to 42 U.S.C. 603 as (d), now obsoleted by P.L. 91-411 sec. 3(a).] [Emphasis supplied];

(8) ". . . with respect to a child because of the conditions in the *home* in which the child resides . . ." [42 U.S.C. 604(b)]. [Emphasis supplied];

(9) "Whenever the State agency has reason to believe any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling, . . . or in seeking appointment of a guardian or legal representative . . ." [42 U.S.C. §605];

(10) "The term 'relative with whom any dependent child is living' means the individual who is one of the relatives specified in subsection (a) . . . with whom such child is living . . . in a place of residence maintained by such individual . . . as his own home." [42 U.S.C. 606(c)].

As can be readily observed, if the word "fetus" were substituted for the word "child" in any of the above-quoted provisions, a ridiculous meaning for the term "dependent child" would result. Thus, the only conclusion that can be drawn is that Congress was not including the fetus within its definition of the term "dependent child".

It should be observed, however, that Congress was not unmindful that in some cases pregnant women need health care as it expressly provides in Title V of the Social Security Act grants to States for "health care to prospective mothers (including after childbirth, health care to mothers and their infants)". [42 U.S.C. §708]

Additionally, Congress, in limiting the AFDC program to children (rather than fetuses) was undoubtedly aware that needy prospective

mothers would be granted alternative public assistance. Shelter, food, medical assistance and clothing are items included in Iowa's general relief program (Chapter 252, Code of Iowa, 1973). Congress in the food program, provides food stamps and double commodities for needy pregnant women.[4]

The form of alternative public assistance is more realistic as the payments thereunder are for the benefit of the prospective mother. A fetus would have no capabilities of utilizing the items which are included as needs of a child in an AFDC grant, i.e., shelter, utilities, supplies and replacements, clothing, personal care and supplies, medicine cabinet supplies and communications.[5]

b. Legislative History

Available legislative history of Title IV of the Social Security Act indicates that Congress invisioned AFDC benefits for living children only.

The purpose was said by the President of the United States to release the mother from the wage-earner role[6] and allow her to be present in the home to raise the young children.[7]

On May 20, 1935, prior to enactment of the Social Security Act, Representative Ellenbogen addressed a Joint Session of the 74th Congress saying:[8]

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[4]Single Appendix, p. 16. See also, 42 U.S.C. §1786 providing for a supplement food program to pregnant and lactating women and infants.

[5]Employees' Manual, Single Appendix, p. 17.

[6]Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 30 (1935):

> "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society."

[7]S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). *See also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 10-12 (1935):

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been advised."

[8]Cong. Rec., Vol. 79, Part 7, pp. 7838-39

> "In our modern society, social security in its true sense means that enactment of laws that will safeguard the fundamentals of life to every human being *from the time of birth* until the time of death. . . .
>
> "The child-welfare laws and public-health measures which we pass should protect the child *from the day of his birth* until he reaches maturity. . . .
>
> ***
>
> "I visualize for the future social security laws which will accompany the individual from *his cradle* to his grave; social security laws which will step in and watch over the child *when it is born*; . . ." [Emphasis supplied.]

Subsequently, on August 20, 1935, in commenting on the Social Security Act relating to dependent children, Representative Ellenbogen stated:[9]

> "The idea will be security of the individual *from birth* to death. . . ." [Emphasis supplied.]

In discussing the Congressional residency requirement for AFDC [42 U.S.C. §602(b) – now obsolete], Representative Randolph on August 20, 1935 stated:[10]

> "Payments: Amount to be fixed by state. Those who qualify: Children who have lived at least one year in the State before making application; and *who were born* within the state one year immediately preceeding application if the mother had resided in the state one year immediately preceeding the birth." [Emphasis supplied.]

In his statements to the Congress, Representative Mills used the term "child population" saying:[11]

> "If they [states] will reduce the rolls as we expect . . . there is plenty of room within a percentage of the *child population* of that state to put any additional deserving family of children on the rolls." [Emphasis supplied.]

Worthy of note are two decisions of this Court citing the congressional history in this pertinent area. This Court in *King v. Smith*, 392 U.S. 309 (1968) at pp. 328-29, said:

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as '[o]ne clearly distinguished group of children'. HR Rep. No. 615 74th Cong. 1st Sess. 10 (1935). This group was composed of children in families without a 'breadwinner', 'wage earner', or 'father' . . . a

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[9]Cong. Rec., Vol. 79, Part 13, p. 13,678

[10]Cong. Rec., Vol. 79, Part 13, p. 13,881

[11]Cong. Rec., Vol. 113, Part 17, August 17, 1967, 90th Congress, 1st Sess., p. 23,053

child would be eligible for assistance if his parent was deceased, incapacitated or continually absent."

And, in *Dandridge v. Williams*, 397 U. S. 471 (1970) at p. 495, the report of Senate Committee on Finances as to the purpose of the Social Security Act of 1935 is quoted as follows:

> "With no income coming in, and *with young children* for whom provision must be made for a number of years, families without a father's support require public assistance . . . Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." [Emphasis supplied.]

c. Administrative Interpretation

The Department of Health, Education and Welfare explained in its Regulation 45 C.F.R. §233.10, captioned "General provisions regarding coverage and eligibility", that:

> (a) *State plan requirements.* A state plan under title . . . IV . . . of the Social Security Act must:
>
> (1)[11] *Specify the groups of individuals*, based on reasonable classifications, *that will be included* in the program, and all the conditions of eligibility that must be met by the individuals in the groups. Under this requirement:
>
> (i) . . . Although the public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. . . . [Emphasis supplied.]

It then made specific provisions relating to the AFDC program in 45 C.F.R. §233.90[12] captioned "Factors specific to AFDC" with (c) thereunder captioned "Federal financial participation". It is significant that HEW divided this subparagraph (c) into two subparagraphs, the first being (c)(1).

In subparagraph (1), the regulation provides that financial participation is provided when all the *mandatory* requirements of a "dependent child" as defined in Title 42 U.S.C. §606(a) are met. However, in a separate subparagraph (c) (2), unrelated to "dependent child" as defined in the Act, HEW provided that "Federal financial participation is available in:

> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis".

It should be observed that Congress itself actually defined the minimum age of a "dependent child" in terms of live birth in that part of the Social Security Act as originally enacted, 42 U.S.C. §602 (b)[13] which

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[11] 45 C.F.R. §233.90 is set out at p. 32, Addendum B hereto.

[12] Addendum B, p.31

was later declared by this court as contravening the fundamental right to travel *(Shapiro v. Thompson*, 394 U.S. 618). There, reference was made to a child "who has resided in the State for one year immediately preceding the application for such aid."

Likewise, HEW in 45 C.F.R. §30(2) defines the minimum age in terms of the birth of a live child. That regulation reads:

> (2) Federal determination of whether an individual meets the age requirements of the Social Security Act will be made according to the common-law method (under which a specific age is attained the day before the anniversary of birth), unless the State plan specifies that the popular usage method (under which an age is attained on the anniversary of birth), is used.

In the two *amicus* briefs furnished the Court, HEW characterized its own regulation for federal aid to the unborn as an "optional provision". That "optional provision", however, grew to be a mandatory Act of Congress by judicial decision.

If Congress had intended AFDC coverage to be that extensive, either as an option or as mandatory, *it* would have so legislated. HEW, by regulation, cannot vary the terms of the Act. *Townsend v. Swank*, supra.

d. Judicial Decisions

In none of the so-called triad, was there any effort, as here, to add another group to the classification, described in the Act.

In all three, there was a dependent child who met the statutory definition, regardless of the fact that its mother had a paramour living within the home *(King)*, or the fathers continued absence was for military service *(Remillard)* or the State statute failed to enumerate the type of school set forth in the Social Security Act *(Townsend)*.

For the courts below to mandate, as they did in this case, coverage for a new group is not only contrary to the triad upon which they relied, but also contrary to *Dublino*, which had been decided and although cited was not referred to by either court below.

On the other hand, except in *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973), decided six months before *Dublino*, and which distinguished the triad, the Courts in other jurisdicitons which held an unborn child was not a "dependent child"[14] did rely upon *Dublino*.

Dublino is of utmost importance for consideration not only in this, but future welfare litigation, for at 93 S.Ct. 2517, we read:

> ". . . Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.

[14]One U.S. Court of Appeals and four federal district courts have held unborn children were not covered. *Wisdom v. Norton* (2nd Cir., Oct. 11, 1974), unreported and thus printed herein at p.14, Addendum A; *Poole v. Endsley*, 371 F.Supp. 1379 (N.D. Fla. 1974); *Vivon v. Keller*, 372 F.Supp. 51 (M.D. Fla. 1974); *Murrow v. Clifford*, Civ. No. 114-73 D.N.J. June 12, 1973); *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973).

"In this context, the dissenting opinion's reliance on *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 598 (1972), and *King v. Smith*, supra is misplaced. In those cases it was clear that state law encluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. . . ." [Emphasis supplied]

Again, in *Dublino*, we read at 93 S. Ct. 2513:

"This court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them."

The Court then quoted from *Schwartz v. Texas*, 344 U.S. 199 (1952), saying:

"The exercise of federal supremacy is not lightly to be presumed"

and continuing at 93 S. Ct. 2513, we read:

"This same principle relates directly to state AFDC programs, where the Court already has acknowledged that States 'have considerable latitude in allocating their AFDC resources since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *King v. Smith*, supra, at 318 - 319; *Dandridge v. Williams*, supra, at 478; *Jefferson v. Hackney*, supra at 541 . . ."

Previously, the Supreme Court in *Jefferson v. Hackney*, supra, stated:

"So long as the State's actions are not in violation of any specific provisions of the Constitution or the Social Security Act, the courts may not void them."

DIVISION III

Fifth and Fourteenth Amendment Claims

Since the Opinion and Judgment of the Court of Appeals turned on the statutory challenge, the Court properly did not reach the alleged violation of the Fifth and Fourteenth Amendments and, properly so, no arguments pertaining need be presented. In passing, however, Petitioners respectfully submit that a fetus has no civil rights to AFDC under the Fifth or Fourteenth Amendment. As this Court noted in *Roe v. Wade*, 410 U.S. 113 at 157 (1973), the word "person" used in the Constitution and its Amendments has no prenatal applications.

Further, this Court previously has held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970).

Iowa has a legitimate interest in providing its available AFDC funds to children (as distinguished from fetuses) to meet their financial needs in instances where their 'breadwinner' has either left the home, is incapacitated or (since July, 1973) is unemployed, in the belief that this best serves the purpose of encouraging the care of dependent children in a home environment and helps "maintain and strengthen family life". [42 U.S.C. §601] Petitioners suggest that this withstands a constitutional challenge under the *Dandridge* rationale.

Conclusion

In the light of the language in the Social Security Act and in the light of *Roe v. Wade*, supra, it is difficult to see how the courts below could have decreed a fetus the right to receive AFDC benefits.

For the foregoing reasons, the Judgment of the Court of Appeals should be reversed and Petitioners respectfully suggest that, to minimize further litigation with varying results in numerous judicial districts, perhaps this Court should make final disposition of all claims made by Respondents in their Complaints.

Respectfully submitted,

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ADDENDUM A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1058—September Term, 1973

(Argued May 29, 1974 Decided October 11, 1974.)

Docket No. 74-1402

BARBARA WISDOM, ANNA TIRADO, and JANE CROE, individually and on behalf of their unborn children and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

NICHOLAS NORTON, Commissioner of Welfare, State of Connecticut and VINCENT B. CAPUANO, Director of Eligibility Services of the Connecticut State Welfare Department,

Defendants-Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges,*
WEINFELD,* *District Judge.*

Appeal from an order of the District Court for the District of Connecticut, Hon. Robert C. Zampano, *Judge*, granting plaintiffs a declaratory judgment and enjoining the State of Connecticut from failing to furnish benefits under the Aid to Families with Dependent Children pro-

* Of the Southern District of New York, sitting by designation.

visions of the Social Security Act, 42 U.S.C. section 601 *et seq.*, to plaintiffs for their unborn children.

Reversed.

FRANCIS J. MACGREGOR, Assistant Attorney General, Hartford, Connecticut (Robert K. Killian, Attorney General for the State of Connecticut, Hartford, Connecticut, of counsel), *for Appellants.*

MARILYN KAPLAN KATZ, Bridgeport, Connecticut (Bridgeport Legal Services, Inc., Bridgeport, Connecticut, and Diane Schneiderman, New Haven Legal Assistance Association, New Haven, Connecticut, of counsel), *for Appellees.*

WEINFELD, *District Judge:*

This appeal presents the question whether an unborn child is eligible for assistance under the Aid to Families with Dependent Children ("AFDC") provisions of Title IV of the Social Security Act of 1935, as amended,[1] and if so, whether the policy of the State of Connecticut of denying such assistance to the unborn child and its pregnant mother is in conflict with the Act and thus invalid under the Supremacy Clause of the United States Constitution.[2]

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1 42 U.S.C. § 601 *et seq.* (1970).

2 To date, 4 courts of appeals and 10 district courts, including the court below, have held that unborn children are entitled to AFDC benefits. *Carter* v. *Hooker*, 43 U.S.L.W. 2037 (1st Cir., July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); *Wilson* v. *Weaver*, 499 F.2d 155 (7th Cir. 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) *and Green* v. *Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973); *Alcala* v. *Burns*, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973), *petition for cert. filed*, 42 U.S.L.W. 3683 (U.S. June 11, 1974); *Doe* v. *Lukhard*, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823

Appellees, plaintiffs in the courts below, commenced this action seeking declaratory and injunctive relief on behalf of themselves and all others similarly situated with regard to the State of Connecticut's policy denying AFDC benefits for unborn children to otherwise eligible pregnant women. In substance, the complaint alleges that this policy violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, as well as the Social Security Act and regulations promulgated thereunder, and thus is invalid under the Supremacy Clause.[3] When this suit was instituted, one of the three named plaintiffs was receiving AFDC assistance on the basis of her two children who were living with her, but was denied AFDC benefits for her unborn child; the other two named plaintiffs were not receiving any AFDC assistance. The defendants are the Commissioner of Welfare for the State of Connecticut and the Director of Eligibility Services for the Welfare Department.

(E.D. Va. 1973), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974); *Wisdom* v. *Norton*, 372 F. Supp. 1190 (D. Conn. 1974); *Stuart* v. *Canary*, 367 F. Supp. 1343 (N.D. Ohio 1973); *Whitfield* v. *Minter*, 368 F. Supp. 798 (D. Mass. 1973); *Jones* v. *Graham*, Civ. No. 73-L-235 (D. Neb., Sept. 5, 1973); *Harris* v. *Mississippi State Dept. of Public Welfare*, 363 F. Supp. 1293 (N.D. Miss. 1973). In addition, two other district courts have granted preliminary injunctions against state denials of AFDC benefits to the unborn. *Tapia* v. *Powell*, Civ. No. 73-B-169 (S.D. Tex., Nov. 4, 1973); *Tillman* v. *Endsley*, No. 73-1476-Civ.-CF (S.D. Fla., Oct. 1, 1973). Four federal district courts have held that unborn children are not covered. *Poole* v. *Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974); *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *pet. for cert. filed in advance of judgment in 5th Cir.*, 43 U.S.L.W. 3095 (U.S. Aug. 7, 1974); *Murrow* v. *Clifford*, Civ. No. 114-73 (D.N.J. June 12, 1973); *Parks* v. *Harden*, 374 F. Supp. 620 (N.D. Ga. 1973).

3 Any question as to the jurisdiction of the federal courts to hear this suit has been settled by the Supreme Court's decision in *Hagans* v. *Lavine*, 415 U.S. 528 (1974).

The district court consolidated plaintiffs' motion for a preliminary injunction with the trial on the merits,[4] and after hearing testimony and ruling that the prerequisites of a valid class action had been met pursuant to sections (a) and (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, granted judgment for the plaintiffs.[5] The district court stayed its judgment and order pending a decision on appeal by this court.

I.

Section 402(a)(10) of the Act requires that ". . . aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."[6] Section 406(a) of the Act provides, *inter alia*, that AFDC benefits shall be paid to a needy "'dependent child' . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with"[7] any one of several listed persons. The Act is silent as to aid to an unborn child. However, the Department of Health, Education and Welfare adopted an administrative practice first under an audit policy[8] and later promulgated a regulation whereby the federal government reimbursed a state, which at its option extended such benefits to "an unborn child when the fact of pregnancy has been determined by medical diagnosis."[9] Connecticut, as have thirty-

4 *See* Fed. R. Civ. P. 65(a)(2).

5 372 F. Supp. 1190 (D. Conn. 1974).

6 42 U.S.C. § 602(a)(10).

7 42 U.S.C. § 606(a).

8 HEW, Handbook of Public Assistance Administration, § 3412.6 (Nov. 3, 1946).

9 45 C.F.R. § 233.90(c)(2)(vi) (1972).

four other jurisdictions, has elected not to pay benefits to unborn children; nineteen jurisdictions have opted to do so. The basic issue, however, centers about the Act and not the regulation.

The district court held the state policy at issue here invalid under the Supremacy Clause of the United States Constitution because it is inconsistent with the eligibility provisions of the Social Security Act.[10] Since states cannot vary the eligibility requirements of AFDC and exclude from its benefits individuals intended to be covered,[11] our inquiry must focus on whether an unborn child is a "dependent child" within the meaning of the Act and therefore entitled to AFDC benefits.

Neither section 406(a) nor any other provision of the Act explicitly includes or excludes an unborn child. As

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10 The court summarized the reasons for its holding:

> 1. The definition of "child" includes a "fetus," an "unborn human being," and an "unborn infant."
>
> 2. The medical evidence clearly indicated that inclusion of the unborn child as a "dependent child" is consistent with the purposes of the Act.
>
> 3. No credible argument can be advanced that Congress intended to exclude an unborn child from coverage of the Act. An unborn child is not any less "needy" or "dependent" than a child who has been born.
>
> 4. HEW regulations have permitted payments to unborn children; the optional features of the administrative regulations, however, are violative of the provisions of the Act.
>
> 5. Both houses of the 92nd Congress proposed amendments to the Act which would have excluded unborn children, but the amendments were not enacted.
>
> 6. In the absence of express congressional authorization, a state policy that excludes persons eligible for assistance under federal standards is in conflict with the Act and is invalid under the Supremacy Clause. 372 F. Supp. 1190, 1192 (D. Conn. 1974).

11 *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1972); *Townsend* v. *Shank*, 404 U.S. 282, 286 (1971); *King* v. *Smith*, 392 U.S. 309, 313 (1968).

has been cogently argued elsewhere,[12] the language of various sections of Title IV makes sense only if the term "child" is limited to those who are born. The statutory scheme supports the view that Congress did not intend to confer welfare benefits to children until they were born. For example, section 401 states the purpose of the AFDC program as "encouraging the care of dependent children in their own homes or in the homes of relatives . . . ."[13] Clearly it is impossible to encourage the care of an unborn child in the home of a relative. So, too, sections 402(a)(7) and (8) of the Act require consideration of a child's income and resources in establishing the amount of assistance.[14] A fetus, of course, has no income. The foregoing, as well as other provisions of the Act—for example, sections 402(a)(11), 402(a)(13) through (15), 402(a)(16),[15] all of which concern living children, give strong support to the view that the "dependent child" referred to in section 406(a) was intended to apply only to one that was born. Appellees' counter argument that where identical words are used in a statute with quite different meanings[16] it is the duty of the courts to give the words different meanings, is quite unpersuasive in light of the overall purpose of Title IV, as reflected by the sections referred to above.

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12 *Miron* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974); *Parks* v. *Harden*, 354 F. Supp. 620, 625 (N.D. Ga. 1973). *See also Wilson* v. *Weaver*, slip opinion Nos. 73-1541, -1749, -1834, -1835 at 9 (7th Cir., May 9, 1974) (Pell, *J.*, dissenting).

13 42 U.S.C. § 601.

14 42 U.S.C. § 602(a)(7) and (8).

15 42 U.S.C. §§ 602(a)(11), 602(a)(13) through (15), 602(a)(16).

16 *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932).

Appellees, however, citing definitions in several dictionaries, argue that the ordinary meaning of "child" includes an unborn child.[17] Appellants argue contrariwise, citing other dictionaries in support of their contention that under ordinary definitions the word "child" does not mean an "unborn child."[18]

This battle of dictionaries appears to be a stalemate. Nevertheless, application of the "ordinary meaning"[19] rule in this case would seem to bear against appellees' position. "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."[20] We are of the view that the word "child" is commonly and ordinarily understood to mean a born child and not a fetus. Indeed, when it is intended to refer to a fetus it is usually modified by another word such as "unborn child." Another example—when enumerating one's offspring it is common to say, where appropriate, "I have two children and one on the way," not "I have three chil-

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17 The American Heritage Dictionary of the English Language (1969); The Shorter Oxford English Dictionary (1933); Webster's New Twentieth Century Dictionary (Unabridged) (2d ed. 1970); Webster's Unabridged Dictionary (2d ed. 1969).

18 Funk & Wagnalls Standard Dictionary, International Edition (1958); The Random House Dictionary of the English Language (Unabridged) (1966); Rogets International Thesaurus (3d ed. 1962); Black's Law Dictionary (4th ed. 1951); Webster's Third International Dictionary (1969); Ballentine's Law Dictionary (3d ed. 1969).

19 *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 36 (1922); *DeGanay* v. *Lederer*, 250 U.S. 376, 381 (1919).

20 *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). *See also Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925): "[T]he plain, obvious and rational meaning of a statute is always preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

dren." Common usage permits the conclusion that while a fetus is more than a non child, it is something less than a child—a view which finds support in the Supreme Court's ruling in *Roe* v. *Wade*,[21] which refused to recognize that a fetus prior to the final trimester of pregnancy has rights separate from those of its mother.

We will assume, however, that the various dictionary definitions of "child" create sufficient ambiguity as to the meaning of that word as used in the AFDC provisions to justify turning to the legislative history of the Social Security Act for guidance. Appellees urge that inclusion of the unborn within the definition of "dependent child" furthers the underlying purpose of the Act of "encouraging the care of dependent children." This is hardly open to dispute—indeed, many other provisions could be read into the Act which would further that underlying policy. However desirable such additions might be, they involve legislative policy considerations and are beyond the scope of the judicial function. The issue is whether Congress intended to extend the benefits of the Act to an unborn child. The entire thrust of Title IV is in furtherance of the interests of living and dependent children. Congress manifested no concern at the time the statute was enacted or in subsequent amendments with making funds available for the benefit of unborn children.

When the Social Security Act was discussed and debated prior to its enactment, what was to become the AFDC program was viewed as a counterpart to, and a federally funded extension of, state statutes known as "mothers' aid" or "mothers' pension" laws. These laws were described as follows:

> "These are not primarily aids to mothers but defense measures for children. They are designed to release

[21] 410 U.S. 113 (1973).

> from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." [22]

Another report stated the following about these laws and the proposed AFDC program:

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised." [23]

Finally, Title IV of the Act emphasizes that it was designed "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives." Thus, it is apparent that an essential purpose of AFDC was to provide assistance to children who were fatherless or whose absent father failed to provide support so that the mother would be released from a wage-earning role and she would remain at home, supervising their upbringing and preventing them from falling into delinquency.[24] Indeed, so strong was that policy, that

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22 Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 30 (1935).

23 S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). *See also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 10-12 (1935).

24 While the AFDC provisions have been amended several times during the intervening years, including in 1962, a change in the title of the program from its original "Aid to Dependent Children" to the present

Congress in 1950 amended the Act so that the aid would include payments "to meet the needs of the relative with whom any dependent child is living." [25] It is equally apparent that this concern that the mother be in the home to raise the child only comes into play once the child is born. On the other hand, the principal purpose to be served by making payments for an unborn child would be the care of its mother during the pregnancy by providing nutrition, medication and health care, which no doubt would be beneficial to the unborn child. The Social Security Act at the time of its passage included a separate program which provides payments for maternal and pre-natal health care, but it does so in Title V,[26] not in Title IV which contains the AFDC provisions.[27] For example, section 508(a) of Title V of the Act[28] authorizes federal grants to state agencies and private agencies in support of projects providing "necessary health care to prospective mothers (including, after child birth, health care for mothers and their infants) who have or are likely to have conditions associated with child bearing . . . ."

"Aid to Families with Dependent Children," *see* Pub. L. No. 87-543, 76 Stat. 172, 185 (1962), there is no evidence that the purpose of the program—promoting the home life of dependent children and their fostering by their mothers or other relatives—has changed. *See* 42 U.S.C. § 601 (1970).

25 42 U.S.C. § 606(b)(1).

26 42 U.S.C. § 701 et seq. (1970).

27 We do not bring attention to Title V with the idea that including unborn children in AFDC would necessarily be inconsistent with providing funds for maternal health care in Title V. To the contrary, as already noted, it would not only be consistent with but it would further the general policy of the entire Act. The significance of Title V for our purposes is as evidence—rather strong evidence when combined with the language and purpose of the AFDC provisions—of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute.

28 42 U.S.C. § 708(a).

We conclude that the language and purpose of the AFDC provisions and the structure of the Social Security Act indicate that unborn children were not intended to be included in AFDC. We are also of the view that the omission of language in the statute and the absence of legislative history specifically excluding (or, for that matter, including) unborn children from coverage is because Congress never contemplated that they be eligible for AFDC benefits. It is manifest that had Congress intended to include unborn children within the definition of "dependent children," in all likelihood it would have expressed itself in clear and unambiguous language.[29]

Appellees place great reliance on a trilogy of Supreme Court cases striking down state legibility restrictions for AFDC benefits.[30] These cases may be summed up as holding that "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."[31] Appellees contend that these cases require inclusion of unborn children in AFDC because fetuses are not specifically excluded from coverage. In a subsequent decision, however, the Court clarified the trilogy rule as applicable to those cases where "it was clear that state law excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible."[32] The

29 *Cf. New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 414 (1973).

30 *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1968).

31 *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

32 *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973).

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Act does not expressly provide that the unborn are eligible; moreover, we have rejected appellees' argument that the unborn come within the Act's definition of "dependent child." Hence the trilogy rule does not apply here.

We do, however, agree with both appellees and appellants that the Department of Health, Education and Welfare ("HEW") is incorrect in its policy of allowing payments to unborn children at the option of the participating states. If unborn children are eligible under the Social Security Act for AFDC payments, the trilogy cases clearly prevent the states from granting or withholding these payments at their options, since the Act itself does not provide such an option. If, on the other hand, unborn children are not eligible under the Act for AFDC benefits, HEW has no authority to approve such optional payments. The Act as to unborn children is either mandatory or it is not; either they are eligible or not eligible as "dependent children." Since we hold that unborn children are not eligible for AFDC, HEW exceeded its authority in granting states the option to make such payments under the Social Security Act.[33]

Appellees contend that we should nonetheless give great weight to the fact that HEW regulations permit AFDC payments to unborn children[34]—although the optional aspect of these payments is invalid—since HEW is the federal agency charged with the program's administration. However, if HEW has incorrectly construed the Social Security Act to permit optional AFDC payments to unborn children, it may also have misconstrued it in ruling

33 In this respect, we disagree with two other courts that have upheld state denials of AFDC benefits to the unborn. *See Poole* v. *Endsley*, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974); *Parks* v. *Harden*, 354 F. Supp. 620, 625-26 (N.D. Ga. 1973).

34 45 C.F.R. §§ 233.90(c)(2)(ii), (c)(3) (1973).

that such payments are permissible under the Act at all. While the construction of a statute by the agency charged with administering it is entitled to be given weight, "in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means."[35] We are convinced that our construction of the statute is correct, and decline to follow the HEW regulation to the extent that payments thereunder of AFDC benefits for unborn children are authorized by the Social Security Act.[36] Moreover, reliance upon the administrative regulation as reflecting Congressional purpose to include an unborn child within the definition of a "dependent child" is misplaced. HEW has expressly disavowed that under the Act an unborn child is within the definition of a needy "dependent child." Its position is that the regulation under which federal financial participation is made available, at the state's option, in payments on behalf of unborn children is an exercise of administrative discretion authorized by the Secretary's broad rule-making authority pursuant to section 1102 of the Act.[37] Specifically with respect to that regulation, HEW is of the view "that Congress did not intend to include unborn children within the definition

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35 *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2d Cir.), (L. Hand, *J.*), *aff'd*, 328 U.S. 275 (1946). *See also Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

36 This conviction is strengthened by the analysis of the court in *Parks* v. *Harden*, 354 F. Supp. 620, 625 n.5 (N.D. Ga. 1973), of the genesis of HEW's policy allowing AFDC payments to unborn children. According to that court, the policy stemmed from a decision by the Social Security Board to waive an audit exception to payments made to unborn children by the State of Wisconsin. Thus, it appears to have originated as an *ad hoc* decision to defer to a state's policy, rather than as a rule based on an interpretation of the federal statute.

37 42 U.S.C. § 1302.

of 'dependent child' contained in section 406(a) of the Act." [38]

Finally, appellees rely on the fact that committees in both Houses of the 92nd Congress proposed an amendment to 42 U.S.C., section 606(a), that would have explicitly excluded the unborn from the term "dependent child."[39] The amendment was not enacted.[40] Appellees interpret this as congressional recognition of the HEW policy and acknowledgment of the correctness of HEW's construction of section 606(a). Another court, however, has pointed out that "the reason the legislation was not passed was because the Congress decided to deal only with the Adult Categories of Public Assistance in [the law that was finally enacted, and] [t]herefore, all references to AFDC were set aside at that time." [41] Moreover, Congress' failure to enact the proposed amendment at that time—or to enact a similar amendment at any other time—may just as logically be interpreted as acquiescence in HEW's policy of making AFDC payments to the unborn optional, a policy which, if upheld, would defeat appellees' statutory claim. "In any event, unsuccessful attempts at legislation are not the best guides to legislative intent"[42]—certainly not as to the intent of the 74th Congress which passed the legislation here at issue.[43] We can discern no clear meaning from the 92nd

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38 Supplemental brief submitted on behalf of HEW in *Adams* v. *Hueeker*, U.S.D.C., W.D. Ky. at 9 (May 2, 1974).

39 *See* H.R. No. 92-231, 92nd Cong., 1st Sess. 184 (1971); S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 467 (1972).

40 *See* Pub. L. No. 92-603, 86 Stat. 1329 (1972).

41 *Mixon* v. *Keller*, 372 F. Supp. 51, 55 (M.D. Fla. 1974).

42 *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 382 n.11 (1969).

43 *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-82 (1947).

Congress' failure to enact the proposed amendment, and for our purposes ascribe no significance to it.

In sum, with deference to the four courts of appeals who have held otherwise, we hold that Connecticut's denial of AFDC benefits to unborn children does not conflict with the Social Security Act.

II.

Since we reverse the district court's holding that Connecticut's policy conflicts with the Social Security Act, we next consider appellees' claim that this state policy of denying AFDC assistance to unborn children violates the Equal Protection Clause of the Fourteenth Amendment.

Appellees originally demanded that a three-judge district court be convened pursuant to 28 U.S.C., section 2281, but the district court's resolution of the pendent statutory claim[44] eliminated the need to consider convening a three-judge court to pass upon the equal protection issue.

Appellees' constitutional attack on the statewide policy of Connecticut's Welfare Department is within the scope of section 2281[45] and the issue is neither "wholly insubstantial" nor "obviously frivolous" so as to avoid under normal circumstances the need to convene a three-judge district court to decide the constitutional issue.[46] Nevertheless, we decline to remand this case to the district judge for him to convene a three-judge district court under 28 U.S.C., section 2284.

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44 *See Hagans* v. *Lavine*, 415 U.S. 528 (1974).

45 *Board of Regents* v. *New Left Education Project*, 404 U.S. 541, 544 n.2, 545 (1972); *Ortiz* v. *Colon*, 477 F.2d 135 (1st Cir. 1973); *Rothblum* v. *Board of Trustees*, 474 F.2d 891 (3d Cir. 1973). *See also Phillips* v. *United States*, 312 U.S. 246, 251 (1940).

46 *Goosby* v. *Osser*, 409 U.S. 512, 518-19 (1973); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1923).

In view of our conclusion that AFDC statutory provisions do not permit, much less authorize, payments to the unborn, there is no reason to remand the constitutional question for determination by a three-judge district court when the result is foreordained since that court, bound as it would be by our determination of the statutory issue,[47] would have to deny the equal protection claim. It would be a waste of judicial manpower and of the litigants' time and resources to require that a three-judge district court go through the ritual of relying on our decision here to reject—as it would have to—appellees' constitutional argument. This conclusion strikes us as particularly appropriate and consistent with the historical purpose of section 2281, which was enacted for the protection of the states from the judgment of a single district judge,[48] a purpose that would not be served by a remand in this case. True, this action deprives appellees of a direct appeal to the Supreme Court from a three-judge court,[49] but Supreme Court review of our decision is available through the device of certiorari, which appears likely, given the status of the litigation on this issue in the various circuits and the already pending petitions for certiorari.[50] Moreover, the direct appeal provision appears "far more likely to have been for the benefit of the state than for the plaintiff."[51]

Turning to the merits of appellees' constitutional claim, we assume, without deciding, that appellees would be en-

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47 *Lewis* v. *Rockefeller*, 431 F.2d 368, 371 (2d Cir. 1970).

48 *Seergy* v. *Kings County Republican County Comm.*, 459 F.2d 308, 313 (2d Cir. 1973).

49 28 U.S.C. § 1253.

50 *See* note 2, *supra*.

51 *Astro Cinema Corp., Inc.* v. *Mackell*, 422 F.2d 293, 298 (2d Cir. 1970); *cf.* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

titled to AFDC benefits in their own behalf rather than in behalf of their unborn children. Essentially, the equal protection claim is based upon alleged discrimination in denying to them, as mothers of unborn children, the AFDC benefits and payments that are provided to all other children and their mothers. The Supreme Court has held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Further, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrimination."[53] Connecticut's policy of denying AFDC benefits to the unborn easily meets that test. Appellees do not allege that it is invidiously discriminatory in a constitutional sense, and the classification is a rational means of advancing the purpose of the AFDC program: encouraging the presence of a relative in the home of a dependent child to supervise the child's upbringing.

The judgment of the district court is reversed.

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52 Appellants contend that appellees can only receive benefits in behalf of their children, and since the Supreme Court ruled in *Roe* v. *Wade*, 410 U.S. 113, 158 (1973), that a fetus is not a "person" for the purposes of the Fourteenth Amendment, appellees' unborn children cannot maintain a claim under the equal protection clause.

53 *Dandridge* v. *Williams*, 397 U.S. 471, 485-87 (1970); *see Jefferson* v. *Hackney*, 406 U.S. 535, 545-51 (1972).

ADDENDUM B

Constitutional Provisions

Article VI, second paragraph [Supremacy Clause]:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes and Regulations

Title 42 U.S.C. §606(a):

> The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

42 U.S.C. 602(b):

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceeding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth. [Obsoleted, *Shapiro v. Thompson*, 394 U.S. 618]

42 U.S.C. 603(d):

> (d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such

State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date. [Repealed, P.L. 91-41 §3(a), July 9, 1969, 83 Stat. 45.]

45 C.F.R. §233.90 Factors specific to AFDC.

(a) *State plan requirement.* A state plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . . .

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(c) *Federal financial participation.*

(1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

(i) Needy child deprived by reason of. The phrase "needy child * * * by reason of" requires that both need and deprivation of parental support or care exist in the individual case . . .

(ii) *Death of a parent.* If either parent of a child is deceased, . . .

(iii) *Continued absence of the parent from the home.* Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, . . .

(iv) *Physical or mental incapacity.* "Physical or mental incapacity" of a parent may be deemed to exist . . .

(v) *Living with [a specified relative] in a place of residence maintained* * * * as his * * * own home. (a) a child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including . . .

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(b) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, . . .

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(2) *Federal financial participation is available in:* [Emphasis supplied]

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(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

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ADDENDUM C

Certificate of Service

I, Lorna Lawhead Williams, Special Assistant Attorney General for the State of Iowa, hereby certify that on the 18th day of November, 1974, I mailed one (1) manuscript copy of BRIEF FOR PETITIONERS and that on the 25th day of November, 1974, three (3) printed copies of BRIEF FOR PETITIONERS were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Attorney for Respondents

I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorney for Petitioners